Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1994

CARL D. WARREN

Petitioner,

V.

UNITED STATES OF AMERICA

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Kentucky

PETITION FOR A WRIT OF CERTIORARI

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February 13, 1995

ISSUES PRESENTED

I

WHETHER THE KENTUCKY SUPREME COURT ABUSED ITS DISCRETION IN DECLINING TO REVIEW THE CLEARLY ERRONEOUS MAJORITY DECISION[1] OF THE KENTUCKY COURT OF APPEALS, WHERE THE EVIDENCE WAS OVERWHELMING THAT POLICE FROM A NEIGHBORING JURISDICTION CONDUCTED A WARRANTLESS SEARCH OF THE PETITIONER'S HOME AND ASSOCIATE PROPERTY, AND WHERE THE TRIAL COURT[2] SPECIFICALLY FOUND THE SEARCH AND THE RECORDING OF NUMBERS ON A JOHN DEERE TRACTOR TO HAVE PRECEDED THE ARRIVAL OF THE SEARCH WARRANT

II

WHETHER THE KENTUCKY SUPREME COURT ABUSED ITS DISCRETION IN DECLINING TO REVIEW AND CORRECT THE CLEARLY ERRONEOUS MAJORITY DECISION OF THE KENTUCKY COURT OF APPEALS, WHERE POLICE OFFICERS FROM A NEIGHBORING JURISDICTION UTILIZED A DEFECTIVE ARREST WARRANT[3] AS A PRETEXT FOR INTRUDING ON PETITIONER'S HOUSE AND EFFECTS, WHERE THE POLICE COMPLETED A PRECISE INVENTORY OF PROPERTY THAT SUBSEQUENTLY PROVIDED THE BASIS FOR SECURING THE SEARCH WARRANT, AND WHERE THE ACTIONS OF POLICE OFFICERS WERE NOT TAKEN IN GOOD FAITH.

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1. The Honorable Michael O. McDonald of the Kentucky Court of Appeals filed a strongly worded dissenting opinion in support of suppression of teh unlawful evidence.

2. The Honorable Athol Lee Taylor, Circuit Judge for Bullitt County, conducted two days evidentiary hearings (June 14, 1991 and March 18, 1991) on Petitioner's motion to suppress evidence, before becoming ill and dying prior to rendering a decision in conformity with his expressed view that the evidence was tainted and should be suppressed. The Honorable Richard Oldham, the Special Judge who inherited the case, conducted no hearing as a basis for his findings of fact and conclusions of law.

3. The arrest warrant was facially defective, in that it was not supported by a criminal complaint affidavit until the day following

PARTIES

The Petitioner is Carl D. Warren, the named Movant-Appellant in the Kentucky Supreme Court below. The Petitioner is represented by Hon. G. Murray Turner.

The Respondent is the Commonwealth of Kentucky. The Respondent is represented by Hon. Chris Gorman, Attorney General of the Commonwealth of Kentucky.

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The order of the Kentucky Supreme Court denying discretionary review of the Majority Opinion of the Kentucky Court of Appeals may be found at Appendix p.26. The Majority Order of the Kentucky Court of Appeals denyingix Petitioner's motion for reconsideration may be found at Appendix p. 24. The Majority Opinion fo the Kentucky Court of Appeals affirming the circuit court's denial of the Petitioner's motion to suppress evidence is unpublished; that Opinion, as modified by the above-referenced Order of the Court of Appeals, may be found at Appendix pp. 14-23.

The Findings of Fact, Conclusions of Law and Order of the Bullitt Circuit Court, denying Petitioner's motion to suppress evidence, may be found at Appendix pp. 11-13.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is respectfully invoked, in that the Order of the Kentucky Supreme Court complained of herein, contravenes the clear and unambiguous holdings of teh U.S. Supreme Court, or in that said Order permits a holding that is in conflict with the holdings of the U.S. Supreme Court, the holdings of the U.S. Sixth Circuit and the holdings of other U.S. Circuits.

The Order of the Kentucky Supreme Court denying discretionary review of the not-to-be published Majority Opinion of the Kentucky Court of Appeals was entered on November 17, 1994.

Jurisdiction is conferred upon the U.S. Supreme Court pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendments IV and XIV of the Constitution of the United States, guaranteeing respectively, protection from unreasonable searches and seizures; and the right to due process and equal protection of the law:

AMENDMENT IV:

The right of the people to be secure in their persons,

houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV, SECTION 1:

All persons born or naturalized in the Untied States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT XIV, SECTION 5:

The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The provisions of Amendment IV and XIV,

§§1 and 5, are enforced by §1257(a) of Title 28 of the United States Code:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the teaties or statues of, or any commission held or authority exercised under, the

United States.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CARL D. WARREN,

Petitioner

V.

COMMONWEALTH OF KENTUCKYRESPONDENT,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

STATEMENT OF THE CASE

On December 5, 1990, a warrant of arrest was issued against the Petitioner by a Jefferson County, Kentucky, District Court Judge. On the following day, December 6, 1990, the arrest warrant was supported by a Criminal Complaint affidavit, tendered by a Detective Stine of the Jefferson County Police[4]. Appendix p. 1-2.

Armed with their defective arrest warrant, Det. Stine and approximately seven Jefferson County Police Officers proceeded across county lines into neighboring Bullitt County, and to the home of the Petitioner.

Although making no attempt to contact any Bullitt County authority, the Jefferson County Police Officers decided at some point to contact a State Police Trooper. By the time the State Police Officer arrived at the Petitioner's residence, Petitioner's front door was apparently unlocked and the door to his garage was allegedly standing open. Putatively attempting to ascertain whether the Petitioner was in hiding, elements of the massive police contingent entered and searched the Petitioner's home, while other officers entered and searched the Petitioner's

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its signing by the District Judge.

4. The execution of an arrest warrant prior to the tendering of a criminal complaint is violative of the Kentucky Rules of Criminal

garage, back yard and other areas. Although apparently quickly satisfying themselves that the Petitioner was not at home, the police were yet combing through the Petitioner's property, inventorying its contents, when the Petitioner returned home, a half hour or so after the police arrived. The Petitioner was immediately arrested. Only then did the State Trooper and Det. Stine depart to secure a search warrant, leaving the remaining Jefferson County Police officers in control of, and continuing their search of the Petitioner's Bullitt county home and associate property. It was not until approximately 6:00 p.m., or after darkness had fallen, that the State Police Trooper and Det. Stine returned to Petitioner's home with a search warrant reflective of an itemized listing of property observed at Petitioner's home.

Subsequent to the Petitioner's arrest and the seizure of numerous items of property, the Petitioner was charged under Bullitt County Indictment No. 91-CR-006, with one count of Receiving Stolen Property. Additional charges were lodged against the Petitioner in Jefferson County. Citing violations of the Fourth Amendment to the U.S. Constitution, the Petitioner moved the Bullitt Circuit Court to suppress the evidence derived from the unlawful search and seizure.

To assess the merits of Petitioner's motion, Bullitt Circuit

Court Judge, Athol Lee Taylor, granted an evidentiary hearing (See Transcript of Evidence; hereinafter TE) on March 18, 1991. At the start of the hearing, Counsel for the Petitioner argued that Jefferson County Police offers had "ramsacked the Defendant's home" before the State Police Trooper arrived, and that there is a glaring facial defect on the arrest warrant relied upon by the police (TE 3-4), thereby reiterating Petitioner's claim of Fourth Amendment violations.

The sole line of defense asserted by the Commonwealth at this hearing was that the venue for the Petitioner's motion should lie in Jefferson County (TE 5-6).

Eugene Bates first offered testimony that he and his son, Robert Bates, Jr., had been working with the Petitioner on erecting a building on Petitioner's property, on the date of December 6, 1990, and that the three men had gone to dinner around 2:00 p.m.; upon returning to the house, the men observed a State Police car sitting in the road (TE 8). The Petitioner was immediately arrested (TE 9). Subsequently, when the senior Bates attempted to retrieve his tools from Petitioner's garage, he was told by one of the Jefferson County Police officers that he could not recover his tools until the search warrant arrived (TE 9-10). It was 10 to 15 minutes before 4:00 p.m. when Bates

encountered the police (TE 10). One policeman used Bates' telephone, while another officer was on the porch of a neighbor using the telephone (TE 11). There was a police officer searching for numbers on a John Deere tractor in the corner of the Petitioner's lot; the officer was communicating by walkie-talkie with the officer on the porch who was using the telephone; Bates assisted the policeman by using his knife to scrape paint off "several numbers . . . different places on the tractor" (TE 11-12). It was around 4:30 p.m. when the tractor was being search for numbers (TE 12) and it was "still real light". Bates observed several officers "in and out" around Petitioner's property (TE 13), around the tractor, in the garage and generally "observing" Petitioner's property (TE 13-15). Bates didn't personally observe police officers inside the Petitioner's house (TE 16), and didn't know when the search warrant arrived (Id.). It was dark when Bates as allowed to get his tools (Id.), and Bates had been told that he could get his tools when the search warrant arrived (TE 17).

The Commonwealth renewed its objection to the venue for the suppression motion and hearing (TE 19).

Louise Bates, the wife of Eugene Bates, was a neighbor of the Petitioner's and observed police at the Petitioner's home

shortly after 2:99 p.m. on December 6, 1990 (TE 22). Mrs. Bates initially observed only plain-clothed officers at the Petitioner's home before additional cars and police arrived (TE 23); she watched officers enter the Petitioner's home (Id.), while others entered the garage and around the corner of the house (TE 24). Mrs. Bates observed officers walk to the area where the building was being erected, and looked around. It was close to 4:00 p.m. when her husband, son and the Petitioner returned home, and the police were yet "in and out around in there" (TE 25). Police were in and out of the garage, walking and looking around (TE 25-26). She observed one officer talking on the phone on a neighbor's porch (TE 26). Mrs. Bates swore that she thought that the police were searching "all the time" (TE 28).

Trooper McMichael of the Kentucky State Police, acknowledged that "it was getting dark, 6:00" when he returned and served the search warrant (TE 30); the judge had signed the warrant around 5:19 (Id.). When Trooper McMichael arrived initially at the Petitioner's home around 2:59 p.m., the garage door and the front door were wide open (TE 31). To the best of his knowledge no search of the property was conducted (TE 33-34). The Trooper admitted that his only information was provided by Det. Stine, as it appeared on Trooper McMichael's

affidavit (TE 35), but denied that it was true that any officer had inventoried the Petitioner's property "unless they came before I was involved" (TE 35). Trooper McMichael had no way of explaining the discrepancy between his testimony and the testimony of Mrs. Bates, but said that there was no reason for the Petitioner's doors to be wide open and it 20 or 30 degrees outside (TE 36). Trooper assumed that the police would have conducted no search because they had no right to do so, but had no idea what the other officers did (TE 37). Trooper had no idea what property was being inventoried while he was away, and didn't know whether anyone was calling in serial numbers (TE 37-38).

Robert Bates, Jr., the son of Eugene and Louise Bates, had worked with his father and the Petitioner on December 6, 1990; he returned around 4:00 and 4:30, at which time the Petitioner was arrested (TE 40-42). Robert Bates observed officers looking in Petitioner's back yard, around the house, in front of the house, around a couple of trailers, at the John Deere tractor that was sitting in the back yard, and around the garage (TE 42). It was around 6:00 p.m. when the search warrant arrived — "almost dark, too dark"; Robert Bates and his father (Eugene) assisted police in identifying numbers earlier, around 4:30 or 5:00 (TE 43). There was an ongoing search, but the

junior Bates couldn't say whether the police were searching the inside of the house or the garage (TE 43-44).

Upon being recalled, Trooper McMichael testified on redirect that the only statement in the record relating to an ice chest is dated December 10, 1990 — four days after the search (TE 46); that he had no idea why Det. Stine obtained it four days later (TE 48); and that he had no idea that the warrant was issued before the complaint statement was made to the judge (TE 51).

Under questioning from Judge Athol Lee Taylor, the Trooper acknowledged that the affidavit was written out by Mr. White, an Assistant Commonwealth Attorney, and signed by the Trooper; that it was Det. Stine who provided the information that went in the affidavit; and that he (Trooper McMichael) was wondering, himself, why Det. Stine hadn't signed the affidavit (TE 51-52). Trooper McMichael acknowledged that the Bullitt County Sheriff's Office was never involved in the case (TE 52).

Diane Hutchins, a neighbor, testified under direct examination that she observed police about the Petitioner's property, upon her stopping by the Bates home, she gave the time as being approximately 3:15 p.m. (TE 53-54). The police were in the house between five and ten minutes (TE 55); she noticed that the police were walking around looking at things

continuously, and they were there up way past dark (TE 56).

At the conclusion of the evidence, the Court indicated that the case applicable to the instant situation (Arizona v. Hicks) was one in which the police had to move VCR (stereo) equipment in order to record the serial numbers (TE 57).

In the "Memorandum of Defendant, Carl D. Warren," of March 18, 1991, the Petitioner reiterated the violations of his Fourth Amendment rights.

On June 14, 1991, a second evidentiary hearing was called, apparently at the request of the Commonwealth, with the Petitioner objecting on the basis that the Commonwealth had waived its right to defend against Petitioner's motion, by acquiescing in the earlier hearing, and further objected owing to the fact that the Commonwealth had moved for exclusion of witnesses at the earlier hearing, so that a subsequent hearing would afford state witnesses beneficial schooling (See Transcript of Hearing of June 14, 1991; hereinafter TH, at pp. 1-2). The Commonwealth admitted having shared a copy of the transcript of the previous proceedings with the police officers who would be testifying (TH 3).

Judge Taylor reiterated his doubt as to the validity of the search warrant, but permitted the Commonwealth to present its

proof (TH 3).

Det. Tom Pendly swore under direct examination that he arrived at Petitioner's home around "a quarter to three" (TH 9); that about 10 or 15 minutes after the arrival of police, the Petitioner was arrested (TH 10); that there was no search "per se" of any of the property until after the search warrant arrived (TH 11); that the search warrant arrived around 5:30, while it was yet daylight (TH 12); and that while taking photos he attempted to locate the exact point on Petitioner's tractor where the correct numbers were located (TH 13). On cross-examination, Pendly acknowledged that he had signed an affidavit to the effect that he had conducted no search until the search warrant arrived (TH 13). He recalled an older gentleman who overheard conversations via radio about searching for numbers on a tractor, and which man scratched numbers off the tractor (TH 14); he had no knowledge of communications between officers at the scene and officers at District Court (TH 14-15); and denied penetrating a six-foot board fence in order to take his photographs of the tractor (TH 17).

Det. Carl Stine testified under direct examination that he took (arrest) warrant from his office and had it signed by the judge on the 6th of December, and that it was his understanding

that the judge put a different date on it (TH 20). Stine swore that he came to Bullitt County the same day (6th), but that some officers arrived at different times (TH 23), but that he (Stine) met with Trooper McMichael prior to arriving at Petitioner's home (TH 23-24). The police intended to secure a warrant in Bullitt County (TH 24), and arrived at Petitioner's home at approximately 3:00; they were acting on information provided by two juveniles, Gary Burden and Shannon Jaggers (Id.). Approximately 25 minutes elapsed between police arrival and the arrest of Petitioner (TH 25/27). Stine accompanied Trooper McMichael to secure a search warrant; Stine swore that McMichael signed the affidavit because it was his (Stine's) "understanding that it would need to be done by someone with authority in Bullitt County" (TH 27-28). Stine swore that the search warrant was signed by the judge around 5:00 (TH 28); that he and McMichael immediately returned to Petitioner's residence, but that he was not present when attempts were made to secure the VIN number off a tractor (TH 29).

On cross-examination Det. Stine denied that it was 6:00 and dark when he and McMichael returned to the residence; he denied knowing what time it was and had no explanation for the conflict between his testimony and that of Trooper McMichael (TH 30). Det. Stine acknowledged that he was in radio contact

with the officers at Petitioner's residence, but stated that there were no communications, except when he advised that he was returning with the search warrant (TH 31). Stine swore that the information about the hot tub was provided to him by Gary Burden, although the hot tub proved not to be stolen (TH 31). He had written statements on other property that proved not to be stolen, but didn't have them with him (TH 32-34). Stine admitted having reviewed the transcript and the testimony of Trooper McMichael (TH34). Petitioner's counsel moved to have Stine's testimony stricken, as it was violative of the order separating witnesses (TH 35). Stine insisted that it was the juveniles who informed him that the John Deere tractor was stolen (Id.), but denied that anyone notified him from Petitioner's residence about property (TH 36). Stine admitted providing property list for affidavit that Trooper McMichael signed (TH 36), but denied knowledge that Jefferson County police were communicating, trying to identify numbers on property and whether property was stolen, before search warrant arrived (TH 38-40).

Sgt. Ron Howard testified under direct examination that the juveniles gave both written and oral statements (TH 41). Howard stated that the police left Louisville around 2:30, met

Trooper McMichael at about a quarter to 3:00, and arrived at Petitioner's property at 3:00 (TH 42-43). Describing the search of the John Deere tractor, Howard swore that there had been no search of the tractor nor use of the telephone until subsequent to arrival of the search warrant (TH 46-48).

Under cross-examination, Howard acknowledged that no one had contacted Bullitt County authorities, and stated that he did call a wrecker prior to the arrival of a search warrant (TH 51). He swore that Det. Stine radioed that they were returning with the search warrant "about 20 minutes after 5", and that they arrived shortly thereafter (TH 52). Howard insisted that it was "right about dark" when they were calling in numbers on the tractor (TH 53), and had difficulty explaining shadows and differences in photographs apparently taken at different times (TH 54-56). Sgt. Howard acknowledged that Petitioner's front door was a storm and security door, that it was closed, and that it was forced by the police (TH 57-58).

On re-redirect examination, Stg. Howard swore that he was present when serial numbers were taken from an ice chest, and that some things had to be moved to get to it, but swore that it was only after the search warrant was returned (TH 61-62). The Commonwealth introduced photos putatively taken at the

same time as were photos introduced by the Petitioner (TH 63-650.

On re-recross-examination Sgt. Howard is unable to explain why a wrecker is depicted in one group of photos, but is not shown in another photo taken from the same angle, at supposedly the same time (TH 66-67).

Trial Court Judge, Athol Lee Taylor, asked why an experienced officer would not obtain the search warrant at the same time he arrived in Bullitt County, and why Howard needed so many police officers to arrest the Petitioner. Howard responded that he needed that number of police to effect the search (TH 67-68).

Mr. Robert Eugene Bates, Sr., appeared and gave testimony in character with his earlier testimony at the Evidentiary Hearing of march 18, 1991 (See TH 70-74).

Mary Ashbury testified under direct examination that she lives directly across the street from the Petitioner, and that Sgt. Ron Howard was using her phone on the day that police came to the Petitioner's house; that the Sergeant was calling for warrants and for I.D. numbers (TH 75); and that the time was around 4:30 or 5:00 (Id.). Petitioner's residence was observed around 3:00 and everything was shut up; police were observed at the

residence (TH 76). Police used her phone for three or four hours (TH 77). Police were going through Petitioner's stuff when she heard Sgt. Howard asking where the warrant was (Id.).

On cross-examination Ms. Ashbury swore that it was after the Petitioner was arrested that the police asked to use her phone; it was 3:45 (TH 78).

On redirect examination she swore that it was, without doubt, bring daylight when the police were examining the tractor (TH 81). On re-redirect she swore that police were still searching through Petitioner's property after Petitioner was in custody, and that a wrecker driver said everything on the property was stolen (TH 82-83).

Subsequent to the latter hearing, the Petitioner filed his Supplemental Memorandum of Defendant, on or about July 15, 1991. Owing to the illness of Judge Athol Lee Taylor, and his resulting death, Special Judge Richard Oldham assumed control of the case. Judge Oldham tendered Findings of Fact, Conclusions of Law and Order (hereinafter, Findings), entered August 26, 1991. Appendix pp. 9-10. On or about September 17, 1991, the Petitioner, pursuant to an agreement with the Commonwealth, entered a conditional plea of guilty to the Bullitt County indictment, while challenging the legality of the underlying search and seizure. On or about November 4, 1991,

the Petitioner was sentenced to five years imprisonment, from which this appeal resulted.

Petitioner's brief on appeal was submitted on March 13, 1992 and duly filed under Case No. 91-CA-2619-MR. Said appeal was consolidated with the Commonwealth's appeal from the disposition of Indictment No. 91-CR-6 (dismissing additional counts of receiving stolen property, charged in Jefferson County), filed as 92-CA-955-MR.

On April 29, 1994, at 2:00 p.m., the Kentucky Court of Appeals, in a not-to-be-published Majority Opinion, affirmed Appeal No. 91-CA-2619-MR (over Judge McDonald's strong dissenting opinion), while dismissing Appeal No. 92-CA-955-MR.

In a Motion for Reconsideration submitted May 9, 1994, Petitioner challenged as errant appellate and Trial Court reliance on the "open fields" doctrine, a defense never asserted by the State (See Motion for Reconsideration, pp 2-3); appellate court's conclusion that the tractor was stolen; and any suggestion that the tractor (located in the fenced backyard) was not within the curtilage of the home (Id.). Petitioner also challenged as erroneous the Majority's conclusion that the Trial Judge had participated in one of the two evidentiary hearings (Id., at pp. 10-

12); and that the incorrect standard of review denied the Petitioner the right of appeal and equal protection of law (Id., at pp. 10-12); and that the incorrect standard of review denied the Petitioner the right of appeal and equal protection of law (Id. at 12-14). The Majority denied reconsideration by Order entered July 29, 1994, but sua sponte modified its Opinion; Appendix p. 14 & pp. 14-23.

The Motion for Discretionary Review was tendered August 18, 1994, and denied by the Kentucky Supreme Court on November 17, 1994; Appendix p. 26.

MAY IT PLEASE THE COURT:

ARGUMENTS IN SUPPORT OF GRANTING CERTIORARI

I

THE KENTUCKY SUPREME COURT ABUSED ITS DISCRETION IN DECLINING TO REVIEW AND CORRECT THE CLEARLY ERRONEOUS JUDGMENTS OF THE INFERIOR STATE COURTS, DENYING PETITIONER THE PROTECTION OF THE STATE AND FEDERAL CONSTITUTIONS, WHERE STATE COURT FINDINGS WERE MADE AND DULY ADOPTED, THAT THE SEARCH OF A JOHN DEERE TRACTOR, LOCATED IN PETITIONER'S FENCED BACKYARD, OCCURRED PRIOR TO THE ARRIVAL OF ANY SEARCH WARRANT, CONTRARY TO THE AFFIDAVITS AND SWORN TESTIMONY OF POLICE, OFFERED IN SUPPORT OF THE STATE'S

LONE ARGUMENT OF DEFENSE AGAINST SUPPRESSION OF THE EVIDENCE.

The Court, pursuant to FRE, Rule 201(d), is respectfully asked to take judicial notice that nowhere in the record of State Trial Court proceedings, did the State assert any defense under the "open fields" doctrine. Indeed, it is clear upon the record that in the hearing of March 18, 1991, the State asserted no character of defense whatsoever, other than insisting that Bullitt County was not the proper venue for the suppression action.

By the time of the second hearing on June 14, 1991, the State had decided to make a fight of it, and police officers involved in the unlawful search and seizure of evidence at the Petitioner's home, were insisting that no search for allegedly stolen property took place under the police were able to secure a search warrant, better than three hours after they had taken over Petitioner's residence.

Det. Tom Pendly swore in open Court (TH 11) that no search of Petitioner's property was conducted until the search warrant arrived, and acknowledged signing an affidavit to that effect (TH 13). Det. Carl Stine swore in open court denying any knowledge that there were communications between and among the police, in attempts to identify numbers on property, before

the arrival of the search warrant (TH 38-40). Similarly, Sgt. Ron Howard swore his denial that there had been any search of the tractor or use of the telephone until subsequent to the arrival of the search warrant (TH 46-48).

These denials were further expressed to the State Trial Court in the Reply Memorandum of Commonwealth, submitted July 5, 1991:

> "There was no search made for any stolen property until a search warrant was received." Reply Memorandum at p. 3.
>
> * * * *
>
> "At the time these numbers were called in, they were in the process of searching, and the search warrant had been in his (Sgt. Howard's) hands for several minutes (Id.).
>
> * * * *
>
> "No search of stolen property was made on the Defendant's premises prior to the securing of the search warrant. All of the police officers testifying in this case have unequivocably (sic) stated that no search for stolen property was made on the Defendant's premises prior to the securing of the search warrant." Id., at p. 7
>
> * * * *
>
> "There is no evidence other than no search for specific personal property was made until after the search warrant was obtained." Id. at pp. 7-8.

There is, and can be, no doubt that the Commonwealth's sole line of defense against Petitioner's motion to suppress the evidence, was that **no property search was made, prior to the return of the search warrant**. Yet, the testimony of various impartial witnesses offered overwhelming refutation of the false, self-serving assertions of the Jefferson County police. See the testimony of Robert Eugene Bates, Sr. (TE 11-12, 13-15); Louise Bates (TE 25-26, 28); Robert Eugene Bates,Jr. (TE 42, 43-44); Diane Hutchins (TE 56); Mary Ashbury (TH 75, 77, 81-82).

So convincing was the proof offered by these impartial observers, that Special Judge Richard Oldham reluctantly found:

> "The checking of the numbers on the John Deere tractor was done **before the search warrant arrived**, but the tractor was in a field in plain view and this action was proper." Emphasis added; Appendix p. 11.

There is irreconcilable conflict in the findings of the State Trial Court, and that conflict renders the court's finding inconclusive and clearly erroneous. The very finding that the search preceded the arrival of the warrant gives lie to the State's sole line of defense. And, having made a finding stripping the State of its sole defense, it is an outrage to fundamental fairness

for the Trial Court to assert a defense on behalf of the State, that the State never asserted for itself.

In sua sponte asserting a "plain view" defense for the police, the Trial Court essentially found that the **police were justified in doing what the police insist that they didn't do**. The Trial Court's finding was clearly erroneous, to the extent that it reached facts and defenses not in evidence, and the Kentucky Court of Appeals was obliged to review and set aside the erroneous finding. Anderson v. City of Bessemer City, 105 S.Ct. 1504, 1511 (1985).

A meaningful review was all the more compelling in the instant case, where a full and fair litigation of Petitioner's claims of illegal search and seizure is required by Kentucky procedure, where the record is insufficient to resolve apparent conflicts, and where a full and fair litigation would have obviated the need to resort to the Federal courts. For, as noted in the case of Lee v. Commonwealth, Ky.App., 547 S.W.2d 792, 794 (1977):

> "From the record it is impossible for us to determine whether the trial court believed the testimony of the officers or, believing that of the appellant, nevertheless concluded that no illegal search had taken place."

In the case at bar, it is clear upon the record that both trial judges involved in this action, found the police officers' version

of events wholly unreliable. And, upon such findings it would be impossible to conclude that "no illegal search had taken place."

Yet, although Judge Oldham conducted no hearing int his matter, it was he who ultimately ruled. And taking departure from the clear leanings of his predecessor (Judge Taylor), Judge Oldham, although finding the officers' version to be false, nonetheless reached beyond the record to find a theory of defense that would not disturb the State's reliance on the tainted evidence. Again, the Trial Court's actions were clearly erroneous. Anderson, supra.

Despite the conflicts and inconsistencies attending the Trial Court's findings, it is clear upon the record that the search of the John Deere tractor preceded the arrival of the search warrant. The Trial Court so found, and such a finding precludes any safari beyond the record in search of mythical "plain view" or "open field" defenses. To the extent that the Commonwealth's sole defense was that no search occurred until the arrival of the search warrant, and to the extent that Trial Court's finding negated that defense, the Petitioner was clearly subjected to an unlawful search and seizure. Fourth Amendment to the U.S. Constitution; Const. of Ky., § 10; Arizona v. Hicks, 107 S.Ct.

1149 (1987).

In declining to review and correct the clearly erroneous judgments of its inferior courts, the Kentucky Supreme Court abused its discretion and denied the Petitioner an appeal as of right. Logan v. Dayton Hudson Corp., 865 F.2d 789 (6th Cir. 1989); Amendment XIV, U.S. Constitution; Const. of Ky., § 115.

II

THE KENTUCKY SUPREME COURT ABUSED ITS DISCRETION IN DECLINING TO REVIEW AND CORRECT THE CLEARLY ERRONEOUS JUDGMENTS OF THE INFERIOR STATE COURTS, DENYING PETITIONER THE PROTECTION OF THE STATE AND FEDERAL CONSTITUTIONS, WHERE POLICE OPERATED UNDER A DEFECTIVE ARREST WARRANT; WHERE POLICE USED THE ARREST WARRANT AS A PRETEXT TO SEARCH AND INVENTORY PETITIONER'S PROPERTY; WHERE POLICE ACCESS TO PETITIONER'S PROPERTY WAS UNLAWFUL; AND, WHERE NO EXIGENCIES OR EXCEPTIONS OBVIATING NEED FOR A SEARCH WARRANT WERE ARGUED OR EXISTED

It is well settled in this Federal circuit and elsewhere, that Trial Courts should be accorded broad discretion in their factual findings. However, factual findings resulting from misapplications of controlling law are not to be upheld. Keir v. United States, 853 F.2d 398 (6th Cir. 1988).

(A)

POLICE OPERATED UNDER A DEFECTIVE ARREST WARRANT, USING SAID WARRANT TO SEARCH AND INVENTORY PETITIONER'S PROPERTY

The record offers glaring proof that the police utilized a defective arrest warrant from Jefferson County, in order to effect a warrantless search of Petitioner's Bullitt County Home. A precise inventory of property found at the Petitioner's residence was then utilized as the basis for securing a search warrant.

The arrest warrant, however, was defective on its face, in that it was signed by the District Judge on December 5, 1990, and not supported by Detective Stine's Criminal Complaint affidavit until December 6, 1990. This is a violation of RCr 2.04(1), and although the Commonwealth, in the hearing of June 14, 1991, made an attempt to introduce an affidavit from a District Clerk, the Petitioner duly objected and the affidavit was never admitted into evidence (TH 4). Moreover, the clerk nor anyone else but the Judge who signed the arrest warrant, would be competent to testify as to when the warrant was signed. And the Commonwealth made no attempt to secure proof from the judge who signed the warrant and dated it December 5, 1990. Det. Stine's own accounting suggests a loose practice with little or no accountability (TH 22-23). There is no competent evidence on the record to cure the glaring facial defect of the

arrest warrant.

Armed with this defective arrest warrant, eight (8) Jefferson County police detectives slipped across the county lines into neighboring Bullitt County, making no attempt to notify any authority in Bullitt County. Only after the penetration had been made, and only after Petitioner's home had been unlawfully invaded did the out-of-county police call in State Trooper McMichael, who met with certain officers at a nearby BP station, before joining the other officers who were already at Petitioner's home.[5]

Neither the Petitioner nor any family member was at home when the police arrived. In fact, under normal circumstances, the Petitioner would have been at work at his place of business located in Jefferson County. It had only been by chance that he had taken the day off to work on an out-building that he was erecting. The police, who had been uninterested in apprehending the Petitioner in Jefferson County, took full advantage of the opportunity to inventory property at Petitioner's residence. And, although many of the items of personal property so inventoried weren't stolen, the police relied upon this list to secure the search warrant several hours later.

Procedure (RCr), 2.04.

5. Det. Stine acknowledged that "(s)ome of them arrived at

Although the Trial Court errantly found that the police compiled their property list from statements provided by the juvenile, Gary Burden (Appendix p. 10), the Court need only compare the detailed list of property on the search warrant affidavit, with the one item listed on the statement of Gary Burden (Appendix p. 10), to realize that Trial Court's finding on this point is woefully out of line with the evidence of record. In fact, while police officers insisted that they possessed written statements from the two juveniles (Det. Stine, TH 31, 32-34; Sgt. Howard, TH 41), the only statements on record were obtained December 10, 1990 — four days after the unlawful search and seizure. See Appendix pp. 9& 10.

The real purpose for attempting to arrest the Petitioner at his Bullitt County home was to facilitate the warrantless search. See United States v. Harris, 321 F.2d 739, 741 (6th Cir. 1963); United States v. James, 378 F.2d 88, 90-91 (6th Cir. 1967).

It is clear upon the record that Judge Taylor, the original Trial Judge, didn't buy the notion that eight (8) Jefferson County police detectives had come swarming across county lines, unannounced and without so much as a by-your-leave, simply to execute an arrest warrant on a Class D felony. Judge Taylor's pointed questions illustrate his grasp of the situation:

THE COURT: You arrived at the house with a search (arrest) warrant, you say sometime around 3. Why in the world would you, an experienced police officer, not obtain the search warrant at the same time that you arrived in Bullitt County? Why would you wait two hours to attempt to obtain a search warrant while you've got all your detectives milling around the area? You know, it's a built-in — it's a built-in suspicion. (TH 67-68).

* * * *

THE COURT: Well, did you need that many troopers to — or that many officers to arrest him?

SGT. HOWARD: No, sir, we needed that many to do the search . . .

Judge McDonald, of the Kentucky Court of Appeals, was similarly convinced that "the arrest warrant scheme was a pretext to conduct a search of appellant's house and premises". (See Judge McDonald's Dissenting Opinion at Appendix pp. 22 & 23).

Clearly, the arrest warrant scheme was a pretext; clearly, too, the officers could not have derived the detailed property listing relied upon to secure the search warrant, from the single item of property listed on the statement of Gary Burden — a statement that wasn't given until four days after the search and

seizure.

The search was unlawful; the findings of Trial Court were clearly erroneous; the Petitioner was denied a full and fair review and denied an appeal as of right, by the State appellate courts. Arizona; Anderson; Logan, supra; Amendments IV and XIV, U. S. Constitution; §§ 10 and 115 of the Const. of Kentucky.

(B)

NO EXIGENCIES OR EXCEPTIONS JUSTIFIED THE WARRANTLESS SEARCH OF PETITIONER'S PROPERTY, AND THE POLICE OFFICERS' ACCESS TO SAID PROPERTY WAS UNLAWFUL

It has never been suggested in the case, sub judice, that any particular urgency existed in apprehending the Petitioner. The Petitioner operates a prominent business in Jefferson County, and could not have been located at his place of business, during working hours, on almost any day. Indeed, because this matter involved no more than a Class D felony, and because the Petitioner would certainly have responded to any lawful summons, the arrest of the Petitioner was unnecessary under RCr 2.04.

More significantly, even had probable cause existed to

effect Petitioner's arret, the absence of exigent circumstances would lie to preclude entry into the Petitioner's home. United States v. Morgan, 743 F.2d 1158, 1161 (6th Cir. 1984), cert. denied, 471 U.S. 1061 (1985).

Yet, this is a case in which no exigencies existed, and where none has been asserted. This is equally true of exceptions to the warrant requirement. None has been asserted by the State. Yet, any reliance on such an exception must be clearly and accurately declared, so that every element of that exception is satisfied. It is not permissible to create an amalgam by combining various elements of different exceptions. Clark v. Commonwealth, Ky.App., 868 S.W.2d 101, 105 (1993).

Notwithstanding the holdings of Clark, supra, the Trial Court has created an amalgam, not of elements of different exceptions, but of elements of a bald denial and of an unasserted exception. Any meaningful State appellate review would have corrected the clearly erroneous finding that any "plain view" exception would lie in this case. Even assuming that the tractor was in plain view, it was certainly not in an open field[6]. More importantly, there was no incriminating character to the John

---

different times", but that he had met McMichael (TH 23).

6. The Petitioner did not own a farm, and testimony confirmed that the tractor was located in this fenced backyard

Deere tractor[7], and although the tractor was seized it was later determined that the tractor was not stolen, and it had to be returned. Again, while the tractor may have been in plain view (to anyone standing in the Petitioner's back yard), it was not apparent that the tractor was stolen, and the scraping away of paint in order to ascertain the VIN number ventured far beyond the tolerance of "plain view". Collidge v. New Hampshire, 91 S.Ct. 2022 (1971).

Finally, the entry of the Jefferson County police onto the Petitioner's property in Bullitt County was unlawful, owing to their lack of jurisdiction. It is quite clear that the detectives recognized their lack of jurisdiction. In explaining why he had not signed the Bullitt County search warrant himself, Det. Stine declared that it was his "understanding that it would need to be done by someone with authority in Bullitt County" (TH 27-28).

It is precisely because the Jefferson County police recognized their lack of jurisdiction (in the absence of some exigency such as hot pursuit), that the detectives sought to work beneath the jurisdictional umbrella of the Kentucky State Police Trooper.

(TE 42).

7. Judicial notice should be taken that Trial Court's Finding that the search of the tractor preceded arrival of the search warrant, must presumptively extend to other property.

Even had the Jefferson County detectives been in possession of a valid arrest warrant, their arrival in Bullitt County, and their entry onto the Petitioner's property (in advance of the State Trooper or some Bullitt County authority) constituted an unlawful intrusion.

More importantly, once having accomplished the stated purpose of arresting the Petitioner, all authority under the arrest warrant was exhausted. Accordingly, it was unlawful for the detectives to remain upon the Petitioner's property once the arrest had been accomplished. This is particularly true once the State Trooper left the scene, thereby stripping the detectives of their umbrella of jurisdiction. Yet, the record reflects that for hours following the arrest of the Petitioner, Jefferson County detectives maintained an arrest of his Bullitt County residence. They prevented Eugene Bates from retrieving his tools from the garage (TE 9-10), and even ordered a wrecker onto the Petitioner's property, prior to the arrival of the search warrant (TH 51). It was this unlawful access that permitted them to search and scrape paint off the tractor, while at the same time searching the entirety of the premises. Clark, Coolidge, supra.

Again, the findings of Trial Court were clearly erroneous; the search was unlawful; the Petitioner was denied a full and fair

review on appeal. Anderson, Arizona, Logan, supra; Constitution of Ky., §§10 and 115; Amendments IV and XIV, U.S. Constitution.

CONCLUSION

Based upon the foregoing, the Petitioner respectfully prays that his cause may find favor with the Court, and that the Writ of Certiorari shall issue forthwith, to review and correct the above decision of the Kentucky Supreme Court.

Respectfully submitted,

G. MURRAY TURNER
MULHALL, TURNER,
HOFFMAN & COOMBS, P.L.L.C.
440 South Seventh Street
Suite 300
Louisville, Kentucky 40203
(502) 584-6375

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

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CASE NO. 90F013919 ARREST 195070

JEFFERSON DISTRICT COURT

WARRANT

COMMONWEALTH OF KENTUCKY VS.
NAME: CARL DOUGLAS WARREN
ADDRESS: 1283 Sanders Lane
ALTERNATE ADDRESS: Brooks, Kentucky
RACE - W
SEX - M
HR. - Brn.
DOB 073050
Ht ____ Wt ____ Eyes ____
Other: SS #403-64-6312

SERVED on the above named defendant this 6 day of Dec., 1990.
Officer "s/J. Schulte 6609"

WARRANT OF ARREST TO ALL PEACE OFFICERS IN THE COMMONWEALTH OF KENTUCKY. You are hereby commanded to arrest the above-named defendant and bring him forthwith before the Judge of the DISTRICT COURT, JEFFERSON COUNTY, KENTUCKY (of, if he be absent or unable to act before the nearest available magistrate) regarding a complaint of T.B.U.T. 0/100 - #0230900 / Unlawful Transaction of a Minor 1st Degree -#0381000 filed by Det. S. Green, #6242, Det. C. Stine, #6645.

You are hereby summoned to appear before the Judge of DISTRICT COURT OF JEFFERSON COUNTY, KENTUCKY, on the _____ day of _____, 19__, at _____ M. at the following location: HALL OF JUSTICE, 600 West Jefferson Street, Court Room No. _____, regarding a complaint of _____ filed by _____. If you fail to appear at the stated time and place you will be subject to the

contempt power of the Court. Issued at LOUISVILLE, JEFFERSON COUNTY, KENTUCKY this 5 day of Dec., 1990. Judge "S/ _____, JEFFERSON DISTRICT COURT.

CRIMINAL COMPLAINT

The affiant, Det. C. Stine, #6645 says that on the 12th day of July, 1990 in JEFFERSON COUNTY, KENTUCKY, the above-named defendant unlawfully removed two "Star" fishing boats valued at three hundred twenty-five dollars each from Wal-Mart, 4840 Outer Loop. Subject was identified by co-defendant who is a juvenile who Warren paid to assist him in committing the theft. Co-defendant's statement was supported by theft report by Wal-Mart. Name, address and telephone number of Affiant: Signature of Affiant: "S/Det. C. Stine. Sworn to before me this 6 day of December, 1990. Tony Miller, Clerk.
CASE NO. _____

COUNTY Bullitt
Court District

AFFIDAVIT FOR SEARCH WARRANT

The affiant, Karl Scott McMichael, a peace officer of the Kentucky State Police, being first duly sworn, states that he has and there is reasonable and probable grounds to believe and affiant does believe that there is now on the premises known and numbered as the residence of Carl Douglas Warren, known as 1283 Sanders; also identified as Marvin (renamed street)

and more particularly described as follows:

Yellow, 2-story house, brown shutters, black shingle roof, black iron railing upon the front steps, basketball goal in driveway, 2-car attached garage; 1/10 mi. North of KY 1526 on Marvin (aka Sanders); 4/10 m. West of I-65.

and/or in a vehicle or vehicles described as:

White Chevrolet
Red Corvette, plate TVG-882

and/or on the person or persons of:

---

the following described personal property, to wit:

An ice machine, double doors; pre-manufactured windows; 2 "Star" johnboats; 2 boat motors;
roofing shingles, felt paper, plywood sheeting; plastic bundles of insulation; Trane brand central air conditioning unit; gas grill; John Deere tractor; various hand tools; Bolins brand riding mower; electric miter saw; Corvette wheels and tires, approximately

_____. (Illegible)

Affiant states that there is probable and reasonable cause to believe and affiant does believe that said property constitutes (check appropriate box or boxes):

X stolen or embezzled property;

___ property or things used as the means of committing a crime;

___ property or things in the possession of a person who intends to use it as a means of committing a crime;

___ property or things in the possession of a person to whom it was delivered for thepurpose of concealing it or preventing its discovery and which is intended to be used as a means of committing a crime;

X property or things consisting of evidence which tends to show that a crime has been committed or that a particular person hascommitted a crime.

Affiant has been an officer in the aforementioned agency for a period of 2-1/2 years and the information and observations continued herein were received and made in his capacity as an officer hereof.

On the 6 day of December, 1990, at approximately 3:30 p.m., affiant received information from/observed:

Det. Chris Stein, Jefferson County Police Dept., that Det. Stein was informed by Gary Burton and Shannon Jaggers, that the property previously listed herein was stolen from several location sin Jefferson County and Bullitt County, and Indiana by Burton, Jaggers and Carl Warren and stored upon the Warren residence property; that Burton had observed the said property at the Warren resi-

dence on the 1st of December.

This officer accompanied Det. Stein to the Warren residence previously identified to make arrest of Carl Warren, under a Warrant issued by Jefferson District Court, and observed the aforementioned a black tandem axle, utility trailer, a green John Deere tractor, pre-packaged-manufactured windows, an ice machine, and 2 john boats, all within plain view from the street and front yard of the property upon this officer's approach to the front door in attempt to execute previously _____ (illegible) arrest warrant.

Affiant has reasonable and probable cause to believe that grounds exist for the issuance of a Search Warrant, based on the aforementioned facts, information and circumstances and prays that a Search Warrant be issued, that this property be seized, or any part thereof, and brought before any court and/or retained subject to order of said court.

"S/Tpr. K.S. McMichael

Subscribed and sworn to before me on this the 6 day of December, 1990, 5:19 p.m.

"S/Bailey Taylor. Title: Bullitt District Judge.

SEARCH WARRANT

Case No. _____
Court District
County Bullitt

TO ALL PEACE OFFICERS IN THE COMMONWEALTH OF KENTUCKY

Proof by affidavit having this day been made before me by Karl Scott McMichael a peace officer of Kentucky State Police, that there is probable and reasonable cause for the issuance of this Search Warrant as set out in the affidavit attached hereto and made a part hereof as if fully set forth herein; you are commanded to make immediate search of the premises known and numbered as 1283 Sanders; (also identified as Marvin) (renamed street)), the residence of Carl Douglas Warren

and more particularly described as follows:

Yellow, 2-story house, brown shutters, black shingle roof, black iron railing upon front steps, basketball goal in driveway, 2-car attached garage; 1/10 mi. North of KY 1526 on Marvin, aka Sanders; 4/10 mi. West from I-65

and/or in a vehicle or vehicles described as:

White Chevrolet
Red Corvette, Plate TVG-882

and/or on the person or persons of:

_____

the following described personal property:

ice machine, double doors, pre-manufactured windows, 2 "Star" johnboats; 2 boat motors; roofing shingles, felt paper, plywood sheeting, plastic bundles of insulation, Trane brand central air con-

ditioning unit; gas grill, John Deere tractor; various hand tools, Bolens brand riding mower, electric miter saw, _____ (illegible) wheels and tires, approximately _____ _____ _____ (illegible).

and if you find the above described property or any part thereof you will seize the property and deliver it forthwith to me or any other court in which the offense in respect to which the property or things taken is _____ (illegible) or retain it in your custody subject to order of said court.

12/6, 1990 "S/Bailey Taylor", Judge
Bullitt District Court

Executed on this the 6th day of Dec., 1990, by Officer "S/ Karl Scott McMichael", of the Kentucky State Police, bade number 389, by searching said premises/vehicle/persons described herein and by seizing the following:

8 Knauf insulation
25 Manville insulation
__ (illegible) bundles Georgia Pac. shingles
__ (illegible) Celotex sheathing
__ (illegible) 1/2 waferboard
__ (illegible) Carado windows
__ (illegible) rolls 30 lb. felt paper
__ (illegible) boxes asst. elec. parts
__ (illegible) boxes of asst. duckwork
1 hand sander
1 Black & Decker mitre saw
1 9 pc. grease gun
Assorted Aluminum Pipe
2 rt. angle Milwaukee drills
2 65 piece socket wrench sts
2 Jon boats

1 gas grill
1 blk trailor w/asst. lumber
1 pair blk. trailor rims
1 Porter cable box - 2 drills
1 9.9 hp boat motor
2 entry lights
1 exit sign
1 John Deer tractor
1 Trane AC unit
2 ladders
1 red & yellow water cooler
2 ladders
1 red & yellow water cooler
1 bx nails (power gun)
Light fixtures
2 tires
1 ice chest
1 blue utility trailor

Lumber on Blk Trailor

12 2 x 6 14'
3 2 x 6 16'
5 2 x 6 10'
9 2 x 4 10'
2 3 x 5 8'
2 2 x 12
16 2 x 6 14'
13 2 x 6 12'
1 4 x 4 12'
1 4 x 4 8'

VOLUNTARY STATEMENT

Shannon Jaggers Sex - M D.O.B. - 7/22/73
Address: 13554 Vim Drive
City: Louisville
State: Ky.

Have been advised that:

1. I have the right to remain silent.
2. Anything I say will be held against me in Court.
3. I have the right to talk to a lawyer and have him present.
4. An attorney will be appointed to represent me if I cannot afford one.
5. I may stop answering questions at any time.

No threats or promises have been made to me. Fully understanding these rights, I wish to waive these rights and proceed with the following voluntary statement. "Doug told me and Gary about a ice box that he wanted. He told us to come and get it and take it to his house. It was at a gas station off High 65 exit. Pretty close to his house. We took it to his house and me, Gary and Doug unloaded it and put it in his garage. We used my dad's truck butt I didn't tell him. Doug wanted me to use it because he said it probably wouldn't fit in his van.

Date 12/10/90 Time: 12:55
Location: 600 West Jefferson

Have read the above voluntary statement made by me and find it to be true to the best of my knowledge.

Signed "S/Shannon Jaggers"
Witness: "S/Chris Stine"
Witness: "S/Thomas Jaggers"

JEFFERSON COUNTY POLICE DEPARTMENT

VOLUNTARY STATEMENT

Gary Wayne Burton Jr. Sex - M Age - 17
D.O.B. - 9/18/73
Address: 1777 Dahl Road
City: Louisville
State: Ky.

Have been advised that:

1. I have the right to remain silent.
2. Anything I say will be held against me in Court.
3. I have the right to talk to a lawyer and have him present.
4. An attorney will be appointed to represent me if I cannot afford one.
5. I may stop answering questions at any time.

I, (illegible) Shannon Jaggers went to the gas station off I-65 on Brooks Exit got the ice machine in the back of the S10 pickup yellow took it to Doug's house put it in the garage. He told us the night that we got it that night would be the last night to get it. It was about a week or two before the gas station opened. He gave us $200.00 for the ice box. He helped us unload it.

Date 12/10/90 Time: 12:55
Location: 600 West Jefferson

Have read the above voluntary statement made by me and find it to be true to the best of my knowledge.

Signed "S/Gary Wayne Burton, Jr."
Witness: "S/Chris Stine"
Witness: "S/Judy Burton"
COMMONWEALTH OF KENTUCKY

BULLITT CIRCUIT COURT

NO. 91-CR-006

COMMONWEALTH OF KENTUCKYPLAINTIFF

vs. FINDINGS OF FACT - CONCLUSION OF LAW ORDER CONCERNING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SECURED BY SEARCH WARRANT

CARL D. WARREN DEFENDANT

The Court finds that the arrest warren in this case was taken to the District Judge for signature on December 6, 1990, and through clerical error was dated December 5th, by the Judge. The Court does not find that the arrest warrant was issued December 5th without an Affidavit to support it until December 6th.

After Warren was arrested in the middle of the afternoon on December 6th, the Court finds that a search warrant was secured and arrived on the scene about 5:30 P.M.

Detective Pendley stated it was still light and he took pictures until it was quite dark, but that he took no pictures and didn't get his camera from his car until after the search warrant arrived. He testified the Trane Air Conditioner was not locked up, but was

sitting on the ground outside the privacy fence on the Warren property.

The entry of the Warren's unlocked home and attached garage searching for him to arrest him, was proper.

Detective Stine testified and the Court finds, that knowledge of the detailed property listed as stolen on the search warrant, was secured primarily from the juvenile, Gary Burden, and not from observation in the Warren home prior to securing a search warrant.

The checking of the numbers on the John Deere tractor was done before the search warrant arrived, but the tractor was in a field in plaint view and this action was proper.

The Court finds no improper conduct in the securing and execution of either the arrest warrant or the search warrant. In particular, the Court finds that nothing was done in the execution of the search warrant until it was properly issued and arrived at Warren's premises.

ORDER

IT IS ORDERED that the Motion to suppress evidence is denied.

"S/Oldham"
Special Judge
Bullitt Circuit Court

ENTERED
August 26, 1991
Jean Hatzell, Clerk
Bullitt Circuit Court

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 91-CA-2619-MR

CARL D. WARREN — APPELLANT

vs. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RICHARD C. OLDHAM, JUDGE
ACTION NO. 91-CR-6

COMMONWEALTH OF KENTUCKY — APPELLEE

and NO. 92-CA-955-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

vs. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE FREDERIC N. FRISKE, JUDGE
ACTION NO. 91-C-6

CARL D. WARREN — APPELLEE

OPINION AND ORDER AFFIRMING APPEAL
NO. 91-CA-2619-MR
AND
DISMISSING APPEAL NO. 92-CA-955-MR

* * * * * * * * * *

BEFORE GUDGEL, McDONALD, and WILHOIT, Judges.

GUDGEL, JUDGE: These consolidated appeals are taken from a judgment and subsequent order entered by the Bullitt Circuit Court

after appellant Carl D. Warren entered an RCr 8.09 conditional guilty plea to one count of knowingly receiving stolen property. On appeal pursuant to RCr 8.09, Warren contends that the court erred by denying his pretrial motion to suppress certain evidence which was seized from his residence pursuant to a search warrant. Moreover, the commonwealth appeals from a postjudgment order which held that the Bullitt County plea was intended by Warren and the commonwealth to adjudicate his criminal liability respecting all stolen property found in his possession on December 6, 1990, including certain items which were stolen from Jefferson County. We affirm the judgment from which Warren appeals, and we dismiss the appeal brought by the commonwealth.

This case began when the Jefferson District Court issued a felony warrant for Warren's arrest. Armed with the warrant, a number of Jefferson County police officers went to Warren's home in Bullitt County in the company of a state trooper who possessed jurisdiction to effect the warrant's service. According to the officers' testimony, the front and garage doors were open when they arrived at Warren's residence, and some of the officers went to the front storm door and knocked. When no one answered, they entered the residence to make sure Warren was not hiding inside. Other officers looked for Warren in the open garage, as well as in

theadjacent field where they observed certain items of property which they believed were stolen. In one instance they went so far as to ascertain the serial number on a John Deere tractor, although that tractor was never confirmed to be stolen. The officers claimed that once they determined that Warren was not at home, they left the residence and garage without conducting a search of those premises. However, they remained in the area outside Warren's residence until he returned home and was arrested.

Meanwhile, the state trooper and one of the officers immediately sought and obtained a search warrant for the property. At that time, the officers possessed information provided by two juveniles to the effect that they had stolen certain personal property in Jefferson and Bullitt Counties and then delivered the stolen items to Warren at his residence. The affidavit filed in support of the search warrant application specifically described some of the stolen items.

Once the search warrant was issued and returned to the scene, the officers conducted a thorough inventory search of Warren's residence and real property. The officers recovered numerous items of stolen property, including an ice chest seized from his garage. Subsequently, Warren was indicted in Bullitt County on one count of knowingly receiving stolen property in regard to

the ice chest, and in Jefferson County on numerous additional counts regarding the other property seized.

Two evidentiary hearings on Warren's motion to suppress were conducted by the regular judge of the Bullitt Circuit Court. That judge, however, became ill and subsequently died. Thereafter, without objection by the defendant, a special judge rendered findings of fact, conclusions of law and an order denying Warren's motion to suppress. Basically, the special judge found that the facts summarized above were true, that the search conducted pursuant to the search warrant were valid, and that the evidence seized during the search was admissible in evidence. As our review of the record shows that these factual findings are clearly supported by substantial evidence adduced at the hearings, these findings are not clearly erroneous. Hence, they are conclusive for purposes of this appeal. RCr 9.78.

In light of the court's adverse ruling on his motion to suppress, Warren entered an RCr 8.09 conditional guilty plea to the one-count Bullitt County indictment, as a result of which he was subsequently sentenced to five years imprisonment. The pleadings filed in support of the RCr 8.09 motion included an attachment which listed not only the single item stolen in Bullitt County, but also those items stolen in Jefferson County. Subsequently, after

conducting another hearing, a third judge entered an order which in effect determined that Warren's Bullitt County guilty plea was intended by Warren and the commonwealth to adjudicate his criminal liability respecting all the items of stolen property found in his possession and listed in the filed attachment, including those stolen in Jefferson County. These consolidated appeals followed.

Warren first contends that the Jefferson District Court arrest warrant violated RCr 2.04 and was invalid because on its face it indicated that it was signed and issued the day before the supporting affidavit was filed. Warren argues that the subsequent search of his residence therefore was tainted and invalid. We disagree.

The commonwealth adduced proof to show, and the court found, that the wrong date was marked on the arrest warrant due to a clerical error, and that both the warrant and the affidavit should have reflected the date of December 6, rather than the warrant showing the date of December 5. Because substantial evidence, including the testimony of Officer Stein, supports a finding that there was a clerical error respecting the date on which the warrant was signed, the court did not err by making such a finding or by upholding the validity of the arrest warrant. Hence, the subsequent search of Warren's property was not tainted by reliance upon an invalid arrest warrant. See Crayton v. Commonwealth, Ky., 846

S.W.2d 684 (1992).

Next, Warren argues in effect that the police conducted an illegal search of his property before the search warrant was issued and returned. As noted earlier, however, the court found in effect that although the officers entered Warren's home and garage, as they were entitled to do for the limited purpose of attempting to serve the arrest warrant, having reason to believe that he was inside because the front and garage doors were open, they did not conduct a search of the premises for stolen property until after the search warrant arrived.

While Warren forcefully attacks the court's finding, the fact remains that there is substantial evidence to support it. Therefore, we need not address Warren's second and third contentions relating to the alleged warrantless and illegal search of his property because the court's factual findings that no such search occurred are not clearly erroneous and, hence, are binding and conclusive. RCr 9.78.

We further note that to the extent Warren argues otherwise, the search conducted in the open field prior to the search warrant's arrival was not illegally conducted insofar as it concerned ascertaining the John Deere tractor's serial number. The pictures of the tractor contained in the record clearly show that the tractor was not

located within the curtilage of Warren's dwelling. Indeed, Warren hardly could have reasonably expected the area of the field where the tractor was parked in plain view, in a spot which was significantly distant from his residence and adjacent to a public road, to remain private. Certainly, in the least it was not an "area to which extends the intimate activity associated with the `sanctity of a man's home and the privacies of life,'" as the curtilage was defined at common law. Oliver v. United States, 466 U.S. 170, 180, 104 S.Ct. 1735, 1742, 80 L.Ed.2d 214 (1984) (quoting from Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886)). Hence, because the tractor was situated in a field in plain view, outside of the curtilage of Warren's residence, Warren had no legitimate expectation that it would be protected from warrantless intrusion by government officers by virtue of the constitutional provisions against illegal searches and seizures. Oliver v. United States, supra.

Next, as Warren failed to raise the issue below, we also need not address his contention as to the trial court's alleged failure to consider sentencing alternatives other than imprisonment. That issue was not preserved for our review.

Finally, in its consolidated appeal, the commonwealth seeks to reverse the court's order finding that Warren and the

commonwealth intended that his Bullitt County guilty plea would resolve his criminal liability as to all items of stolen property found in his possession on December 6, 1990, including those stolen in Jefferson County. Warren filed motions to dismiss the Commonwealth's appeal and to strike its brief because the commonwealth failed to designate for inclusion in the record any transcript of the hearing relating to the order from which this appeal was taken, and because the appendix to the commonwealth's brief improperly included matters not included in the clerk's record. The commonwealth filed no response to these motions, and they were passed to this panel on the merits. Then, although Warren reiterated his argument in support of the motions as contentions in his appellee's brief, the commonwealth filed no reply brief in response. Warren's motion to strike clearly is meritorious. Since the commonwealth failed to designate for inclusion in the record any transcript of the hearing which resulted in the order from which the appeal was taken, we must assume that the evidence fully justified the trial court's action in entering such an order. This is especially true since we can find nothing in the record to show that the commonwealth objected to the entry of the order appealed from despite having been given notice of the hearing when the motion seeking entry

of such an order was filed. For these reasons, we are constrained to GRANT Warren's motion to dismiss the commonwealth's appeal.

The judgment in Appeal No. 91-CA-2619-2619-MR is affirmed. Appeal No. 92-CA-955-MR is hereby ORDERED DISMISSED.

WILHOIT, JUDGE, CONCURS.

McDONALD, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

ENTERED: July 29, 1994.

"S/Paul O. Gudgel", Judge, Court of Appeals.

McDONALD, JUDGE, DISSENTING. I dissent because it is clear to me that the arrest warrant scheme was a pretext to conduct a search of appellant's house and premises. The attorney general, at oral argument, admitted that the police "did indeed mean to search" the house and premises and "there is no question they intended to search."

The attorney general said there was a mix up. The police intended to have a search warrant in conjunction with the arrest warrant but failed to get it.

Under the admitted facts, eight Jefferson County police offers and a state trooper were used to serve an arrest warrant on the

appellant for a Class D felony theft. Although the appellant was not at home, the police, armed with the arrest warrant, searched his house and inventoried what they believed were stolen items. This inventory later became the basis for the search warrant that was subsequently secured.

In my opinion, this scenario is so tainted that the search and the fruits therefrom should be suppressed.

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COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

91-CA-2619-MR

CARL D. WARREN APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
ACTION NO. 91-CR-6

COMMONWEALTH OF KENTUCKY APPELLEE

* * * * * * * * * * *

BEFORE: GUDGEL, McDONALD and WILHOIT, Judges

The Court has considered appellant's motion for reconsideration of Opinion and Order Affirming and appellee's response thereto, and, being sufficiently advised, ORDERS the motion be DENIED.

Further, on the Court's own motion, it is hereby ORDERED that the attached pages 1 through 9 be SUBSTITUTED for pages 1 through 9 of the Opinion and Order rendered April 29, 1994.

McDONALD, JUDGE, DISSENTS and would grant appellant's motion for reconsideration.

ENTERED: July 29, 1994

"S/Paul O. Gudgel", JUDGE, COURT OF APPEALS

RENDERED: April 29, 1994: 2:00 p.m.
AS MODIFIED: July 29, 1994; 10:00 a.m.
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY
94-SC-673-D
(91-CA-2619-MR)

CARL D. WARREN — MOVANT

vs. BULLITT CIRCUIT COURT

COMMONWEALTH OF KENTUCKY — RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED November 16, 1994.

"S/Robert F. Stephens", Chief Justice.